In the

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

ANTHONY F. SEEBERGER et al.,
Plaintiffs in Error,
vs.
LEANDER J. McCORMICK,
Defendant in Error.

Error to the
Circuit Court
of the United States
for the Northern
District of Illinois.

BRIEF FOR PLAINTIFFS IN ERROR.

HIRAM T. GILBERT,
For Plaintiffs in Error.

Barnard & Gunn Print. Company

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BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

MAY IT PLEASE THE COURT:

This was an action brought by the defendant in error, McCormick, against plaintiffs in error in the Superior Court of Cook county, Illinois. A trial by jury was waived and the cause was submitted to the court upon an agreed statement of facts (Rec., 35-68), the case made by which is, in substance, as follows:

On January 31, 1893, articles of association and an organization certificate of the Market National Bank of Chicago were duly filed in the office of the comptroller of the currency. On February 9, 1893, the president and secretary of the bank, in the name of the bank, pursuant to a resolution of the board of directors, of which plaintiffs in error were members, entered into a lease with McCormick for premises to be occupied as a banking room. The banking association had not, at that time, been

authorized by the comptroller of the currency to commence the business of banking, and, in fact, never was so authorized; but subsequently, after its officers had entered into possession of the leased premises, and in the month of July, 1893, the organization was abandoned. So far as appears, no representations of any kind or character had been made to McCormick, at the time the lease was entered into, respecting the power of the bank to enter into it, unless the mere fact that the board of directors passed the resolution authorizing its execution, and the president and secretary accordingly did execute it, amounted in law to such a representation. Whether any of the plaintiffs in error, or, if so, which ones, participated in the passage of the resolution does not appear. The banking association refused to be bound by the lease on the ground that it was an *ultra vires* contract. McCormick insisted that the lease was a valid contract and binding upon the association, and brought suit against the bank to compel it to pay the stipulated rent. In that suit, which was submitted to the court upon the same agreed statement of facts as that upon which this case is submitted, the lease was held *ultra vires* and void, and a judgment was entered in favor of McCormick for $2,548.35, being the amount of rent and other charges accrued down to the time the premises were abandoned. That judgment having been affirmed by the Supreme Court of Illinois (*McCormick* v. *Market National Bank*, 162 Ill., 100), McCormick brought the case by writ of error to this court, which, in an opinion delivered by Mr. Justice Gray (*McCormick* v. *Market National Bank*, 165 U. S., 538) affirmed the judgment and held that the lease was void because, at the time it was entered into, the banking association had not been authorized by the comp-

troller of the currency to commence the business of banking, and therefore the contract was one prohibited by that portion of section 5136 of the Revised Statutes of the United States, which provides as follows:

> "But no such association shall transact any business except such as is incidental and necessarily preliminary to its organization until it has been authorized by the comptroller of the currency to commence the business of banking."

Upon the foregoing facts, the trial court, in the case at bar, found the issues in favor of plaintiffs in error, and entered judgment accordingly. Upon appeal, however, to the Appellate Court of the First District, that court (Rec., 87-88) reversed the judgment of the Superior Court and entered judgment against plaintiffs in error and in favor of McCormick for $22,208.33 and costs of suit. This judgment was, upon writ of error, affirmed by the Supreme Court of Illinois (*Seeberger* v. *McCormick,* 178 Ill., 404). To reverse the judgment of the Supreme Court of Illinois the present writ is prosecuted.

In *McCormick* v. *Market Bank,* 163 U. S., 538-551, *supra,* this court, in reference to the comptroller's examination into the condition of a national banking association and to his certificate of its authorization to commence the business of banking, speaking through Mr. Justice Gray, said:

> "The result of the comptroller's examination, and his certificate of that result, and of the authority thereupon granted the corporation to commence the business of banking, of course appear on the records of his office, as do the articles of association and the organization certificate previously transmitted to him. *Every one dealing with the corporation is bound to take notice of the facts thus appearing on a public record, upon which, by the very terms of the national bank act, depend the right of the associa-*

tion to exist as a corporation, and its capacity to transact business."

Upon the trial of this case in the Superior Court of Cook county, the defendants, in accordance with the rule of law thus laid down by this court, contended that they were protected from liability to McCormick because the Federal statute and the records of the comptroller's office were constructive notice to McCormick of the want of power on the part of the bank to enter into the lease in question, and, hence, there being no pretense of any representations made by them to him, aside from the mere fact that the president and secretary of the bank signed the lease and the board of directors authorized it, there was no ground upon which they could be held liable.

The trial court adopted this view by refusing to hold as law applicable to the case proposition number 7, offered by McCormick, which was as follows (Rec., 72):

> "7. The court holds that *so far as the obligations of these defendants are concerned, the plaintiff was not bound to examine the records of the office of the comptroller of the currency to ascertain the facts touching the organization of the Market National Bank, and that he was not chargeable with notice of the facts contained in or omitted from such record, touching such organization, so far as defendant's obligations were concerned,* and he had the right to rely upon the representations, acts and conduct of the directors and officers of such corporation, respecting its legal organization, and its right to commence a banking business, and its right to execute the lease in question, and a representation need not be expressed, but may be implied, either from acts, silence or other conduct."

In accordance with its ruling upon this proposition, it entered judgment against McCormick and in favor of the defendants. Upon the appeal of McCormick to the Ap-

pellate Court of the First District he assigned for error, by his ninth assignment of error (Rec., 82), the refusal of the trial court to hold said proposition number 7 as law applicable to the decision of the case.

Our contention is that the Appellate Court, by the reversal of the judgment of the Superior Court, and the Supreme Court of Illinois, by the affirmance of the judgment of the Appellate Court, have necessarily held that said proposition number 7 was a correct proposition of law applicable to the decision of the case, that such holding was decisive of the case, that it was erroneous, and that thereby a federal question is presented which this court has power to review.

BRIEF.

There is a federal question involved in this case.

Sec. 5136, R. S. of United States.

McCormick v. *Market Bank,* 165 U. S., 538.

Plaintiffs in error specially set up and claimed immunity by reason of Sec. 5136 of the Revised Statutes of the United States.

Armstrong v. *Treasurer, &c.,* 16 Pet., 279.

Des Moines Nav. Co. v. *Iowa Homestead Co.,* 123 U. S., 552.

The decision of the state court was against the immunity claimed by the plaintiffs in error.

The decision of the state court was decisive of the case and it was erroneous.

McCormick v. *Market Bank,* 165 U. S., 538.

I.

THERE IS A FEDERAL QUESTION INVOLVED IN THE CASE.

This case is as much dependent as to its result upon the construction and effect to be given to section 5136 of the Revised Statutes as was *McCormick* v. *Market Bank, supra.* In that case, McCormick based his right of recovery, and the bank based its claim of immunity from liability, upon section 5136. Then McCormick claimed the lease was authorized by the statute in question. Now he claims that it was not authorized and asks the court to so hold and make the defendants liable because thereof, while the defendants, admitting the lease to be prohibited by section 5136, insist that McCormick was chargeable with notice of the statute and of the records of the comptroller's office, and that this notice to McCormick protects them from liability to him. The case is one arising out of said section 5136, but for which it never would have arisen, and both parties must have the same right to the decision of this court that McCormick and the bank had in the case referred to.

That the effect to be given to a federal statute and to the acts and records of public officers in pursuance thereof is, and must necessarily be, a federal question within the jurisdiction of the federal courts to determine, cannot successfully be denied, for otherwise it would follow that the state court could nullify any federal statute by declining to give it its proper legal effect without there being any right of review by the federal courts.

To hold that the Supreme Court of the United States can declare that every one dealing with a national banking association is bound to take notice of its powers under the

Revised Statutes of the United States, and that immediately thereafter the state court can declare the contrary, without its decision being subject to review, looks to us quite absurd. If a state court has the power to finally determine that, no matter what may be the terms of an United States statute, a person dealing with a national banking association is not bound to take notice of it, it might as well be given the power of finally determining that the statute is void.

II.

IMMUNITY OF PLAINTIFFS IN ERROR FROM LIABILITY BY REASON OF A FEDERAL STATUTE WAS ESPECIALLY SET UP AND CLAIMED.

The agreed statement of facts and the stipulation connected therewith (Rec., 67) entitled either party to "establish any cause of action or any defense that they could respectively establish under any form of pleading." In other words, all questions of pleading were waived and every averment of fact in the agreed statement is to be treated as if it were averred in a plea. In pursuance of this stipulation the plaintiffs in error had the right to insist upon immunity from liability by reason of section 5136 of the Revised Statutes of the United States referred to and the records of the comptroller's office and the rule of law charging McCormick with notice thereof. The benefit of this immunity was reserved to them by the terms of the stipulation.

That the immunity we now rely upon was claimed is further established from the fact that Proposition No. 7, above referred to (Rec., 72) was submitted to the trial

court and rejected by that court as not being a correct proposition of law. If such immunity had not been claimed by the plaintiffs in error no such proposition would have been asked by McCormick nor would the trial court have refused to hold it as law applicable to the decision of the case.

It is not the law, and never has been, that for the purpose of giving this court jurisdiction there must appear in the record a statement in express terms that a right, privilege or immunity was claimed under some specified federal statute. It is sufficient if it appears from the whole record that such right, privilege or immunity was necessarily raised and involved in the case, and that the judgment of the court was of necessity a decision upon it.

Armstrong v. *Treasurer, &c.*, 16 Pet., 279.
Des Moines Nav. Co. v. *Iowa Homestead Co.*, 123 U. S., 552.

Here there was an express statement in the stipulation that at the time the lease in question was entered into the banking association had not been authorized by the comptroller of the currency to commence the business of banking. This is to be treated as an averment of a fact relied upon by plaintiffs in error as a defense to McCormick's suit. It is as clearly so as if the stipulation recited that the defendant's claimed to be protected from liability because the banking association at the time the lease in question was entered into had not been authorized by the comptroller of the currency to commence the business of banking.

It is clear, then, that this immunity was claimed by the defendants in the trial court and it is equally clear that whether such immunity existed was raised in the Appel-

late Court (Rec., 82) by the ninth assignment of error made by appellant McCormick, which was as follows:

> "The Superior Court erred in not holding as law in the decision of said cause that *so far as the obligations of said defendants are concerned the plaintiff was not bound to examine the records of the office of the comptroller of the currency to ascertain the facts touching the organization of said bank and that plaintiff was not chargeable with notice of the facts contained in or omitted from such records touching such organization so far as defendants' obligations are concerned,* and that plaintiff had the right to rely upon the representations, acts and conduct of the directors and officers of such corporation respecting its legal organization and its right to commence a banking business and its right to execute the lease in question, and the representations need not be expressed, but may be implied either from acts, silence or conduct, and it is error for said court to refuse to hold as law proposition No. 7 as tendered to the court."

As plaintiffs in error had been successful in the trial court they, of course, could not and did not, in the Apellate Court, assign any errors or in any other express manner, as far as the record shows, urge their immunity from liability by virtue of section 5136 of the Revised Statutes. That immunity had been allowed to them by the trial court, and by his assignments of error McCormick sought to have that decision of the trial court reversed. When the judgment of the trial court was reversed and a contrary judgment entered by the Appellate Court, and the case was removed by writ of error by the present plaintiffs in error to the Supreme Court, the question of their immunity from liability was raised by the assignments of error that the Appellate Court erred in not affirming and in reversing the judgment of the Superior Court. Under the practice in the Supreme Court of

Illinois no other assignments of error were necessary or allowable, but those assignments raised all the questions presented by the record.

III.

THE DECISION OF THE STATE COURT UPON THIS FEDERAL QUESTION WAS DECISIVE OF THE CASE.

It is a well settled rule of law that where the parties entering into a contract are mistaken merely as to the law and there has been no mistake of fact on the part of the complaining party, produced by the action of the opposite party, there can be no liability. In other words, if the want of authority on the part of an agent is a matter of law, the agent cannot be held liable upon an implied warranty, no misrepresentation having been made by him as to any fact. This rule is one recognized by the Supreme Court of Illinois in its opinion, where the following language is used:

> "Where the contract is made in good faith and both parties are fully cognizant of the facts, and the mistake is one of law only, the result of which is to exonerate the principal from liability, because the agent had no lawful authority to make the contract, it is clear that the agent cannot be held liable, either *ex contractu* or *ex delicto*."

If the law is as thus laid down by the Supreme Court of Illinois, its judgment cannot be sustained unless this court was wrong when speaking through Mr. Justice GRAY, in *McCormick* v. *Market Bank, supra,* it said:

> "Every one dealing with the corporation is bound to take notice of the facts thus appearing on a public record upon which, by the very terms of the national bank act, depend the right of the association to exist as a corporation and its capacity to transact business."

If McCormick was, as a matter of law, bound to take notice of the facts thus appearing upon the records of the comptroller's office, it follows, as a necessary conclusion and as a matter of law, that at the time of entering into the lease in question he was bound by law to know that it was a contract not within the power of the association to enter into. It is, therefore, clear that had the Supreme Court of Illinois held, under the agreed facts, that McCormick, at the time he entered into the lease, was bound to take notice of the want of power on the part of the corporation to enter into such a contract, it could not have decided in his favor, unless it could have held, as a matter of law, that a party entering into a contract with a corporation, with full knowledge that it was one which the corporation had no power to enter into, could hold the board of directors personally liable thereon, a proposition which no court ever has held as law and which it is plain the Supreme Court of Illinois did not intend to so hold.

It follows that the question whether, as a matter of law, McCormick, as against plaintiffs in error, was chargeable with notice that the lease was a contract which the Market National Bank had no power to enter into was decisive of the case.

IV.

THE DECISION OF THE SUPREME COURT OF ILLINOIS UPON THE FEDERAL QUESTION WAS ERRONEOUS.

That, as against the Market National Bank, McCormick was chargeable with notice of its want of power to enter into the lease was settled by this court, as we have already seen, in the suit brought by McCormick against the bank.

McCormick v. *Market Bank,* 165 U. S., 538.

To say that he was bound by such knowledge as against the bank and, under precisely the same facts, not bound as against the plaintiffs in error individually is seemingly inconsistent.

From an inspection of this record it will be seen that this is not a case where any charge can be made against plaintiffs in error, excepting that they, like McCormick, erroneously assumed the lease was a contract within the power of the banking association to enter into. The sole charge made against them is that they were members of the board of directors of the association and that the board passed a resolution authorizing the execution of the lease in the name of the bank. They in no manner solicited McCormick to make the lease, nor made any representations to him whatsoever. Indeed, this record does not show affirmatively which ones of the plaintiffs in error participated in the meeting of directors at which the resolution in question was passed, and, unless it is a necessary inference of law that every member of a board of directors of a corporation is present at every meeting and votes in favor of every resolution adopted, there is, in this record, no foundation for the judgment entered against plaintiffs in error, even if the other facts essential to their liability were established.

In considering this question it is highly important that there be no misapprehension on the part of the court as to the condition of this record, and as to the legal questions which are thereby presented. That there may be no such misapprehension we will briefly call the court's attention to the record.

The case was submitted to the trial court for trial without a jury upon an agreed statement of facts. (Rec., 35 to 68.) Upon this agreed statement of facts the trial

court entered judgment in favor of plaintiffs in error. (Rec., 32 to 34.) Before entering judgment, and for the purpose of saving to defendant in error, McCormick, the benefit of exceptions to its rulings upon questions of law, the trial court passed upon and refused to hold as law applicable to the decision of the case ten propositions (Rec., 69 to 76), among which was proposition No. 7, hereinbefore referred to.

The Appellate Court (Rec., 87 to 88) reversed the judgment of the trial court, entered judgment in favor of McCormick for $22,208.33, and made an entry in its judgment finding "the facts as set forth in the stipulation in the record." This was in pursuance of section 87 of the Illinois Practice Act, which reads as follows:

> "If any final determination of any case, as specified in the preceding sections, shall be made by the Appellate Court as the result, wholly or in part, of the finding of the facts concerning the matter in controversy, different from the finding of the court from which such cause was brought by appeal or writ of error, it shall be the duty of such Appellate Court to recite in its final order, judgment or decree, the facts as found, and the judgment of the Appellate Court shall be final and conclusive as to all matters of fact in controversy in such case."

It is self-evident that this statute was framed for the purpose of enabling the Supreme Court, upon appeal or writ of error, to determine the question, whether, as a matter of law, the facts thus found by the Appellate Court were sufficient to support its judgment, and it has been so construed repeatedly by the Supreme Court.

Brown v. *Aurora,* 109 Ill., 165.
Jones v. *Fortune,* 128 Ill., 518.
Hawk v. *C., B. & N. R. R. Co.,* 138 Ill., 37.
Siddall v. *Jansen,* 143 Ill., 537.

In the case at bar the Supreme Court, in its opinion, which, it may here be remarked, is somewhat hazy upon this point (Rec., 110), say:

> "In considering, then, the view of the case (which we are inclined to adopt), that the finding of the Appellate Court was a finding of the facts different from the facts found by the trial court, the question of law is raised by the record itself *whether or not the facts as found are legally sufficient to support the judgment.*"

This being so, the facts set forth in this stipulation must be construed as if they were embodied in a declaration or a special verdict, and if, when so regarded, they are not sufficient in law to support the judgment, the judgment must be held as erroneous.

Now, the facts set forth in the agreed statement, which forms a part of the judgment of the Appellate Court, when stripped of unnecessary verbiage, so far as they have any bearing upon the liability of plaintiffs in error, may be stated as follows:

The Market National Bank of Chicago was duly organized as a national banking association by the filing in the office of the comptroller of the currency, on the 3d day of February, 1893, of articles of association and an organization certificate, but it was never authorized by the comptroller of the currency to commence the business of banking. Plaintiffs in error were members of its board of directors. January 31, 1893, A. F. Seeberger was elected president and William Cox cashier of the Market National Bank. The board of directors passed a resolution purporting by its terms to authorize A. F. Seeberger to enter into the lease in question with McCormick, and thereupon, on February 9, 1893, the lease was entered into in the name of the bank. McCormick, at the time he

entered into the lease, understood and believed that the bank had the power to enter into the lease and had no actual knowledge or information to the contrary until the 15th day of August, 1893. The bank subsequently declined to be bound by the lease, and McCormick, having brought suit on it against the bank, recovered no rent accruing after August 15, 1893.

Upon these facts, in the absence of any representations on the part of plaintiffs in error to McCormick, their liability depends solely upon the fact that the board of directors passed a resolution authorizing the execution of the lease, and that they were members thereof, though, for aught that appears, some of them may not have been present at the meeting, or, if present, may have voted against the resolution.

The question then presented by the record is this: Is McCormick to be held chargeable with notice that the lease in question was void at the time it was entered into, in a suit brought by him against directors of the bank, who did not solicit him to enter into the lease, who made no representations, and who, in fact, were guilty of nothing except being members of the board of directors, which board passed a resolution authorizing the lease to be entered into in the bank's name?

If he was chargeable with such notice, there can be no liability on the part of defendants in error upon the theory of an implied warranty, for an *implied* warranty can never exist in favor of one who is chargeable with knowledge that the facts supposed to be warranted by the other party do not exist.

As to what the effect of section 5136 of the Revised Statutes of the United States is as notice to one dealing with a national banking association and its officers is

clearly, as we have above shown, a federal question, and as this court decided it in *McCormick* v. *The Market Bank, supra*, adversely to McCormick, we respectfully insist it must adhere to that ruling in this suit against plaintiffs in error, based, as it is, upon the same state of facts that was presented in that case.

If we are correct in this view, it follows that the state courts erred in this ruling upon proposition number 7, above referred to, and as such ruling was upon a federal question and decisive of the case, this court has jurisdiction of the case, and should reverse the judgment of the Supreme Court of Illinois.

Respectfully submitted.

HIRAM T. GILBERT,
For Plaintiffs in Error.

No. 322.

Reply Brf. of Gilbert for P. E.

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Error to Supreme Court of Illinois.

BRIEF AND ARGUMENT IN REPLY FOR PLAINTIFFS IN ERROR.

HIRAM T. GILBERT,
FOR PLAINTIFFS IN ERROR.

BARNARD & MILLER PRINT, CHICAGO.

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Brief and Argument in Reply for Plaintiffs in Error.

MAY IT PLEASE THE COURT:

We will briefly consider the positions assumed by counsel for defendant in error in their brief in support of their motion to dismiss.

I.

It is assumed that the Supreme Court of Illinois found the facts in its opinion, and that such finding must be accepted by this court as the basis of its decision. That this view is erroneous will be apparent to any one familiar with the statutes of Illinois regulating the practice in the Supreme and Appellate Courts.

Section 89 of the Illinois Practice Act (3 Starr & Curtiss, 2d Ed., page 3,136, Laws of Illinois of 1877, page 148), is as follows:

> "§ 89. The Supreme Court shall re-examine cases brought to it by appeal or writ of error *as to questions of law only*, and no assignment of error

> shall be allowed which shall call in question the determination of the inferior or Appellate Courts upon controverted questions of fact in any case excepting those enumerated in the preceding section."

The preceding section 88, thus referred to (3 Starr & Curtiss, 2d Ed., page 3,115, Laws of Illinois of 1877, page 148), so far as it is necessary to quote it, is as follows:

> "88. Appeals from and writs of error to Circuit Courts and the Superior Court of Cook County and city courts, in all criminal cases and cases in which a franchise or freehold or the validity of a statute is involved, shall be taken directly to the Supreme Court, in case the party appealing shall so elect, excepting in cases of chancery."

The case at bar, not being one of the excepted cases, the power and duty of the Supreme Court was limited strictly to the determination of the question of law whether the facts found by the Appellate Court, and embodied in its judgment, were sufficient to support that judgment. There was and could be no question of *evidence*, nor could the Supreme Court lawfully draw any conclusions from the facts recited in the judgment of the Appellate Court, excepting conclusions of law. See page 13 of our original brief and the statute and decisions there cited.

Now the Appellate Court did not find that there was any implied warranty on the part of plaintiffs in error, of power in the banking association to enter into the lease. The agreed facts adopted by the Appellate Court as its finding, are barren of any such statement. If any conclusion can be drawn from the agreed facts that there was an implied warranty, it must be drawn as a conclusion of law and not as a conclusion of fact. This court,

therefore, must consider, not what the Supreme Court of Illinois may have said in its opinion respecting questions of fact, which it had no lawful power to decide, but what its conclusion of law was upon the facts found and recited by the Appellate Court. That conclusion, briefly stated, is as follows:

Directors of a national banking association, who have consented to the execution of a lease in the name of the association before it was authorized by the comptroller of the currency to commence the business of banking, a resolution of the board of directors having been passed purporting to authorize such lease, are personally liable thereon to the lessor, as, in such case, the lessor is not bound to take notice of the facts appearing on the records of the comptroller of the currency disclosing the want of power on the part of the association to enter into the lease.

If the Supreme Court, by unlawfully assuming the power to pass upon questions of fact, can control the action of this court, it can deprive this court of its jurisdiction. Such cannot be the law. The facts in this case are, for the purposes of a review by this court, to be ascertained from the finding of the Appellate Court and that alone, and if, by the facts thus found, a federal question is presented, this court has jurisdiction.

This is quite plainly stated by the Supreme Court of Illinois itself, in its opinion (Rec., 110), when it says:

> "So treating the finding of the Appellate Court as *a finding of the ultimate facts upon which it based its judgment* of damages then recovered for the first time by the plaintiff, the *legal* question arises, independently of any propositions of law, *whether the law authorized the judgment which was rendered on such facts or not.*"

Manifestly, according to the Supreme Court of Illinois itself, its consideration of the case could involve no questions of evidence or questions of fact, nor could it make any finding of facts. Its power was limited to determining the simple question of law *whether the ultimate facts found by the Appellate Court authorized the judgment.*

It is true the Supreme Court (Rec., 114) in the passage cited by counsel for defendant in error in their brief (p. 33), say:

> "And there can be no doubt of the legal sufficiency of the evidence to establish an implied warranty of authority to enter into the lease on behalf of the corporation."

And the court also say (Rec., 114):

> " Where the contract is made in good faith and both parties are fully cognizant of the facts, and the mistake is one of law only, the result of which is to exonerate the principal from liability because the agent had no lawful authority to make the contract, it is clear that the agent cannot be held liable either *ex contractu* or *ex delicto.* The Appellate Court was authorized to find, *and doubtless did find*, that this was not such a case. These directors were charged with knowledge that they had taken the necessary steps to obtain and had not obtained the certificate of the comptroller necessary to confer power to make the lease, and *it was a fair inference for the Appellate Court to draw from the agreed facts* that McCormick did not know of this omission until August 15, 1893. "

But clearly the question is not whether the *evidence* was legally sufficient to establish an implied warranty, or whether it was a fair inference for the Appellate Court to draw from the agreed facts that Mc Cormick did not know of the omission of the comptroller's certificate, or

whether the Appellate Court was *authorized* to find any particular fact. On the contrary the question, as we have seen already from the opinion of the Supreme Court of Illinois, is what the Appellate Court *did* find and what judgment the finding *actually made* would justify.

The passage last cited from the opinion of the Supreme Court, however, conclusively shows how vital to this case is the question whether Mc Cormick was bound to take notice, as against plaintiffs in error, of section 5,136 of the revised statutes of the United States and of the records of the office of the comptroller of the currency made in pursuance thereof.

They declare:

First. That plaintiffs in error were chargeable with knowledge that they had not taken the necessary steps to obtain and had not obtained the certificate of the comptroller necessary to confer the power to make the lease.

Second. That Mc Cormick was not chargeable with such knowledge.

As a conclusion they say the mistake of Mc Cormick was not one of law but of fact, and hence he could recover against plaintiffs in error, who were bound to know the facts, he not knowing them and not being bound to know them.

Clearly, then, there is not in this case any legal finding of facts by the Supreme Court of Illinois standing in the way of a decision by this court upon the merits. The facts are to be sought in the finding of the Appellate Court, and in that alone. This is as true as if the facts, the legal effect of which was to be determined, were embodied in a declaration, a plea, or a special verdict, in

which latter cases, it would be ridiculous to suppose the Supreme Court could have any power or authority to make any finding of facts binding upon this court. This court, in such cases, would look solely to the declaration, plea or special verdict, and not to loose and u warranted remarks of the Supreme Court about *evidence.*

II.

It is contended that conceding it is a Federal question whether, as between McCormick and the banking association, the former had constructive notice of the want of power on the part of the latter to enter into the lease, it is not a Federal question, but a question of general law, as between McMormick and plaintiffs in error, whether McCormick had such constructive notice.

If this position were sound, it would follow in every case that while the construction of a statute of the United States was a question for this court to decide, the question whether a party *was bound to take notice of the statute and the proceedings under it, would be one of general law,* the decision of the State Court upon which this court could not review. This would be equivalent to holding that while this court might decide what a statute meant, it would be for the State Court alone to decide whether a party was bound by it.

The true view manifestly is, that the "Federal question," in such a case embraces not only the construction of the statute, but also its effect upon the parties in the particular case. Whether in the case at bar it affected McCormick, is clearly a Federal question.

III.

The point that the immunity claimed was not "specially set up or claimed" is discussed in our original brief (pp. 7–10). We will add a few words to what is there said:

Counsel say that "no claim was made in the trial court that a federal question of any kind was involved, nor was any made in the Appellate or Supreme Courts of the state;" "no question of the admissibility of evidence was raised," and "nothing whatever appears in the record anywhere raising or purporting to raise any federal question."

Let us briefly consider the position of plaintiffs in error in each of the state courts.

FIRST. *As to their position in the trial court, the Superior Court of Cook County.*

The fact that the association had not been authorized by the Comptroller of the Currency to commence the business of banker, is distinctly averred in the agreed statement (Rec., 53), and is thus specially set up as a ground of defense. Furthermore, paragraph 19 of the agreed statement (Rec., 65–67) recites the proceedings in the former suit, including the opinions of the Appellate and Supreme Courts of Illinois, thus showing the want of the comptroller's certificate as a ground of defense.

As already stated, plaintiffs in error, being successful in the trial court, could not show, except by implication, any claim of immunity on the part of plaintiffs in error.

The record, as made up, could only show those rulings of the trial court to which McCormick excepted. Among

the rulings, as we have already pointed out, to which McCormick excepted, was that upon Proposition No. 7, which held him bound by constructive notice of the records of the office of the comptroller of the currency. This ruling, by necessary implication, shows that the immunity from liability was especially claimed, and that it was allowed by the trial court. Why should McCormick have asked for such a ruling, if there was no claim on the part of plaintiffs in error of immunity from liability?

The fallacy of this argument of counsel for defendant in error lies in its failure to recognize that this was not a case where plaintiffs in error were beaten in the trial court, and where, by their own bill of exceptions, they could affirmatively show that immunity from liability was expressly claimed by them.

SECOND. *As to the position of plaintiffs in error in the Appellate Court.*

Plaintiffs in error, having been successful in the trial court, could assign no errors in the Appellate Court, nor could they assert their claim of immunity in any other manner than by insisting that there were no errors in the record. By his ninth assignment of error (Rec., 82), McCormick insisted that the trial court erred in not holding Proposition No. 7 was law, and consequently plaintiffs in error, *by their joinder in error*, insisted that said Proposition No. 7 was not good law, and that they were protected from liability because, as the court below had held, McCormick was bound to take notice of the records in the comptroller's office?

In what other way, or how more effectually, could plaintiffs in error have set up in the Appellate Court their claim of immunity from liability?

THIRD. *As to the position of the plaintiffs in error in the Supreme Court.*

The sole question for the consideration of the Supreme Court was, whether the facts found by the Appellate Court, and embodied in its judgment, were sufficient to support that judgment. Questions of rulings of the trial court upon the evidence were not before the Supreme Court. There was no way in which plaintiffs in error could present a federal question, or any other question, to the Supreme Court excepting by the usual and only proper asssignments of error, to wit: that the Appellate Court erred in reversing and in not affirming the judgment of the Superior Court. So, if there was a federal question in the record when the case was in the Superior and Appellate Courts, it was there when the case reached the Supreme Court and was presented to that court by the assignments of error which the Supreme Court could not decide without at the same time deciding the federal question upon which the validity of the judgment of the Appellate Court depended.

That the Supreme Court may not have expressly mentioned the federal question in its opinion is of no consequence. The opinion is no part of the record, and, in any event, it is apparent that the State Court could not defeat the jurisdiction of this court by ignoring, in its opinion, a federal question fairly presented by the record.

In *Roby* v. *Colehour*, 146 U. S., 153, this court said:

> " But although it does not appear from the opinion of the court of original jurisdiction, or the opinion of the Supreme Court of Illinois, that either court formally passed upon any question of a federal nature the necessary effect of the decree was to

> determine adversely to Roby, the rights and immunities claimed by him, in the pleadings and proofs, under the proceedings in bankruptcy to which reference has been made. * * * Our jurisdiction being invoked upon the ground that a right or immunity, specially set up and claimed under the constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right, so set up and claimed, was expressly denied, *or that such was the necessary effect in law of the judgment.*

The necessary effect in law of the judgment of the Supreme Court affirming the judgment of the Appellate Court was to concur with that court in denying the claim of plaintiffs in error to immunity from liability, and in its ruling that proposition No. 7 should have been held as law applicable to the decision of the case. If the Appellate Court, by reversing the judgment of the trial court and in entering its own judgment denied such immunity from liability, the Supreme Court by affirming that judgment likewise denied it.

Apart from these considerations, it would seem to follow as a necessary consequence that inasmuch as *McCormick* v. *Market Bank*, 165 U. S., 538, presented a federal question, the case at bar must also present a federal question.

By reference to the record (p. 66), it will be seen that paragraph 19 of the agreed statement, which paragraph contains a recital of the proceedings in *McCormick* v. *Market Bank*, expressly avers that *McCormick* v. *Market Bank* was submitted to the court upon the precise facts set forth in the preceding eighteen paragraphs. Those facts, with the rulings of the court thereon, were held by the court to present a federal question. How,

then, by the mere substitution of the names of plaintiffs in error in place of the Market National Bank, can the federal question be eliminated from the case?

IV.

Assuming the law to be, as we contend, that McCormick, as against plaintiffs in error, was chargeable with notice of section 5,136 of the Revised Statutes of the United States and of the record of the comptroller's office made in pursuance thereof, it is clear the judgments of the Appellate and Supreme Courts of Illinois cannot be sustained. The case, then, becomes clearly one in which McCormick entered into a contract which he was bound by law to know was not within the power of the Market National Bank. The law applicable to such a case is well settled.

In *Abeles* v. *Cochran*, 22 Kan., 405, a banking corporation, through its board of directors, assumed to enter into a contract for the purchase of its own stock, a transaction prohibited by law. The party with whom the contract was made, not being able to enforce the contract as against the corporation, brought suit against the directors. In deciding the case Mr. Justice BREWER, among other things, said:

> "The parties who represented the bank and made the purchase for it were the defendants. They were its directors, yet as directors they had no power to bind the bank by a purchase of its stock, and the attempted sale was a nullity, and the bank properly recovered in an action to set aside the certificates of deposit issued on such attempted purchase. Now the contentiou is, that inasmuch as the defendants attempted to bind the bank and failed, they there-

fore bound themselves; that the case comes within the rule that an agent who acts without authority binds himself and not his principal. This rule, however, is not of universal application. There are exceptions to it, and this case comes within one of those exceptions. It will be noticed that the failure of the directors to bind the bank arose from a lack of power in them as directors, and not from any failure to pass the proper resolution as a board, or to take any other prerequisite step. The law under which the corporation was organized gives no such power to directors. (*German Savings Bank* v. *Wulfekuhler*, 19 Kas., 60.) It is something the directors may not do. They cannot create the power. Their acts or omissions in no manner affect the question of its existence. And this want of power, growing out of the law, is a matter of law as open to the knowledge of the plaintiff as of the defendants. Further, there is no pretense of any false representations made by defendants, or of any concealment of facts—nothing to show any willful wrong on their part. Both parties, in fact, supposed the power existed in the directors to make the purchase, contracted upon that basis, and contracted in good faith. The power did not exist, and the bank repudiated the purchase. And the defendants can be held only upon the bare proposition that because the principal was not bound, the agent must be. But this does not necessarily follow. It is familiar law that where there is an express contract the law will not imply one. In other words, when parties have definitely put their intentions into the shape of an agreement, the law accepts that agreement as the measure of their respective rights, and will not attempt to infer the existence of some other agreement which the parties ought to have made. Here the contract as made was in the name of the bank, and for the bank. That was the express agreement. Will the law imply another? Will not the contract actually made determine the rights of the respective parties?

"Where there is no wrong imputable to the agent,

no action will be against him; not on the contract, for the contract was not his, nor for any wrong of act or omission, for he is guilty of none. * * *

"In *Sandford* v. *McArthur*, 18 B. Mon., 411, it appeared that the directors of a bank ordered the issue of notes in excess of the authority given by the law of the bank's incorporation, and they were held not personally liable, and that a person dealing with the bank was bound to take knowledge of the powers granted by law to its agents. See also, Story on Agency, Sec. 265; *McCurdy* v. *Rogers*, 21 Wis., 197; *Rashdall* v. *Ford*, 2 L. R. (Eq. Cases), 750; *Beattie* v. *Lord Edbury*, 7 L. R. (Ch. Appeals), 777.

"The doctrine of these last two cases is that a misrepresentation as to a matter of law is not such a one as will cast a personal liability on the agent, and that on the ground that each party is bound to know the law.

"It is unnecessary to pursue this examination of authorities further. The doctrine is clear that where the contract is made in the name of the principal and without any personal covenant on the part of the agent, and without any wrong on his part, either in act, statement or omission, the latter is not responsible, even though the former be not bound."

Between the case cited and the one at bar there would seem to be no difference in principle. McCormick, being bound to take notice of the statute regulating the powers of a national banking association and of the records of the office of the Comptroller of the Currency affecting those powers, is exactly in the position of the party dealing with the bank in the case cited. He made a contract which he was bound to know was invalid. This mistake was one of law, and not of fact. This, if not manifest otherwise, would be apparent from the fact that in his suit against the bank in the state court (*McCormick* v. *Market Nat'l Bank*, 162 Ill., 100), and in this court

(*McCormick* v. *Market Bank*, 165 U. S., 538), the proceedings in which are a part of the findings of the Appellate Court in this case (Rec., 67), he strenuously insisted that the lease was a contract within the power of the corporation to make, and was therefore binding upon it. Defeated in that suit, he now, after precisely the same state of facts, with equal zeal insists that he was mistaken, not as to the law, but as to the facts, and therefore is entitled to hold plaintiff in error liable.

In conclusion, we insist upon the following propositions:

First. That McCormick was, as a matter of federal law, bound to take notice of the powers of the Market National Bank, and as a matter of law knew the lease in question was *ultra vires*.

Second. That such knowledge on the part of McCormick protected plaintiffs in error from liability, because it rendered the mistake of the parties one of law only, it being essential to his recovery against them that he should be in a position to aver and maintain that he did not know and was not bound to know the lease in question was *ultra vires*.

Third. That the record in this case shows that the result depended upon the construction to be given by the court to section 5,136 of the Revised Statutes, and the duty imposed upon McCormick thereby, and that plaintiffs in error expressly claimed immunity under the statute.

Respectfully submitted.

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